IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

25 April 2019

CASE No: AIFC-C/SCC/2019/0001

AURORA AG LIMITED

Claimant

v

STAR ASIAN MINING COMPANY LLP

Respondent

JUDGMENT

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

1. **The Defendant shall, by 4pm on 10 May 2019, pay the Claimant KZT 44,885,081.15 or the US Dollar equivalent at the time of payment.**

JUDGMENT

1. The Claimant claims sums due under a contract (**"the Contract"**) entered into between the parties on 17 July 2018. By the terms of the Contract, the Claimant was engaged to carry out ground-based geophysical works for the Defendant in East Kazakhstan. The Claimant's position is that it carried out the works but has not been paid by the Defendant.

2. Clause 11.5 of the Contract was in the following terms:

> "All disputes and disagreements that may arise between the Parties shall be settled through negotiations. Unresolved disputes are resolved in Astana International Financial Centre Court."

3. The Constitutional Statute of the Republic of Kazakhstan on the Astana International Financial Centre, Constitutional Statute No. 438-V ZRK of 7 December 2015 (as amended), Article 13(4)(3), confers jurisdiction onto the AIFC Court over:

> "… disputes referred to the AIFC Court by agreement of the parties."

4. This Court therefore has jurisdiction over this claim.

5. The sum claimed by the Claimant is KZT 38,167,552 plus VAT = KZT 42,747,658.24, together with contractual interest of KZT 2,137,382.91. The sum claimed is equivalent to approximately USD 110,000 plus interest. This claim is therefore appropriate for determination in the Small Claims Court pursuant to the AIFC Court Rules (**"ACR"**), Rule 28.2(1).

6. The Claimant commenced these proceedings by issuing a Claim Form on 19 March 2019. In accordance with ACR Rule 28.11, the Registry took steps to serve the proceedings on the Defendant. On 19 March 2019, the Claim Form and supporting documents were delivered to the Registered Office of the Defendant. However, the offices were found to be occupied by a third party. On the same date, the documents were sent to two email addresses provided to the Court by the Claimant: gokhanefe.dogu@starasiamining.com and gokhanefedogu@gmail.com. A read receipt was received from the former email address on 20 March 2019. I am therefore satisfied that the claim form and supporting documents have been brought to the attention of the Defendant and have in any event been served in accordance with ACR Rules 5.3 and 5.6(1).

7. The Defendant has not responded to these proceedings. Rules relating to default judgment do not apply to claims in the Small Claims Court: ACR Rule 28.7. I must therefore decide the claim on its merits.

8. The Claim Form is supported by a statement of truth signed by Ms Assiya Azimkali, the Claimant's in-house legal counsel. The Claim Form is accompanied by a copy of the Contract, an invoice, a document entitled "Act of Performed Works" and a number of items of correspondence. The documents are provided in both Russian and English.

9. On 3 April 2019, the Court directed the parties to file and serve by 10 April 2019 any further evidence on which they intended to rely and to state whether they requested an oral hearing of the claim. The Claimant was directed to provide an explanation of various matters relating to the quantification of the claim.

10. On 10 April 2019, the Claimant submitted a letter responding to the Court's directions. In that letter, the Claimant confirmed that it was content for the claim to be decided without a hearing in accordance with ACR Rule 28.39. On 22 April 2019, the Claimant provided a further copy of the letter, this time supported by a statement of truth signed by Ms Azimkali. The Defendant has not responded to the Court's directions.

11. As the Defendant has not engaged with these proceedings to date, no conflict of evidence arises. The Claimant has submitted everything on which it intends to rely and has requested a determination without a hearing. A hearing is therefore likely only to delay the claim. In the circumstances, I will decide this claim without a hearing in accordance with ACR 28.39.

12. The parties entered into the Contract on 17 July 2018. I summarise the key terms below:

    a. By clause 1, the Claimant was obliged to carry out geophysical survey works as described in Appendix 1 to the Contract. The work was to be completed by 30 October 2018;

    b. By clause 2, the total price payable by the Defendant was to be KZT 49,236,992.00, inclusive of VAT.

    c. By clause 2.4, the Defendant was entitled to reduce the work required under the Contract and pay only for the work carried out.

    d. Clause 3 required the Defendant to pay the contract price in three instalments:

        i. 40% payable no later than 15 days after the conclusion of the Contract;

        ii. 40% payable on completion of the works; and

        iii. 20% payable within 5 business days after the signature of the Act of Performed Works document and the Claimant's submission of a work execution report.

    e. Clause 5 provided a mechanism by which the Claimant would submit the Act of Performed Works document to the Defendant. The Defendant was then obliged either to sign the document or to give notice of defects.

f. Clause 6.6 imposed on the Defendant a "fine" for late payment of the sums due under the Contract, in the amount of 0.05% of the overdue sum per day, up to a maximum total of 5% of the overdue sum.

g. By clause 11.6, the law governing the Contract is AIFC law.

13. Ms Azimkali's evidence is that the Claimant carried out Geophysical works in accordance with the terms of the Contract. According to the Claimant's correspondence, the work was completed on or before 15 August 2018.

14. On 29 November 2018, the Claimant submitted an invoice to the Defendant, together with the Act of Performed Works document. The document recorded the value of the works carried out as KZT 42,747,658.24.

15. The sum claimed is somewhat less than the full contract sum of KZT 49,236,992. Ms Azimkali's evidence is that the sum claimed represents the value of the work done. I infer from this that the scope of the work described in Appendix 1 of the Contract was reduced, in accordance with clause 2.4, with a corresponding reduction in the Contract price.

16. By clause 3.1 of the Contract, payment of the first 40% was due no later than 15 days after the conclusion of the Contract, with the second 40% due on completion of the works. The final instalment of 20% was payable within 5 business days after the signature of the Act of Performed Works document and the provision by the Claimant to the Defendant of a work execution report: clause 3.1.1.

17. I have been provided with a copy of the Act of Performed Works document. I have not been provided with any document entitled "work execution report". It may well be that this formed part of the works required under the contract. The scope of works in Appendix 1 to the Contract required the Claimant to produce various reports. Ms Azimkali's evidence is that the Act of Performed works was signed on behalf of the Defendant. The document records the price of work provided as KZT 42,747,658.24. If the report referred to in clause 3.1.1 was part of the works, the Defendant has therefore admitted that it was provided.

18. Even if something more was required to trigger the final instalment, Ms Azimkali says and I accept that the Defendant has admitted in discussion between the parties that the sum claimed is due, but it simply refuses voluntarily to pay. In any event, the Defendant has not defended this claim and has not suggested that any particular contractual milestone remains outstanding.

19. In the circumstances, I accept that the sum due from the Defendant to the Claimant under the Contract is KZT 42,747,658.24.

20. The Claimant claims a further sum of KZT 2,137,382.91 pursuant to clause 6.6 of the Contract. This provides for payment of a sum, described as a "fine", on the sum due at the rate of 0.05% per day,

capped at a maximum of 5% of the overdue sum. The maximum sum due under this provision is therefore incurred once the debt is 100 days overdue.

21. The Contract was signed in July 2018 and the work was completed in August. The first two instalments, amounting to 80% of the price, were therefore due much more than 100 days ago. The final invoice and Act of Performed Works document were provided to the Defendant on or about 29 November 2018. It has not been suggested that anything further was required at that time to trigger the obligation to pay the final instalment under the Contract and, as I have said, the Defendant has admitted its liability. It appears to me likely that the full debt was incurred on or before 29 November 2018, whether or not the "work execution report" was provided as part of the work required by the Contract or at some earlier time.

22. As a result, the maximum further sum due under clause 6.6 of 5% has been incurred on the whole of the overdue debt in the sum of KZT 2,137,382.91. No further interest is claimed under any enactment.

23. I find that the Claimant is therefore entitled under the Contract to the total sum of KZT 44,885,081.15, inclusive of the "fine" due pursuant to clause 6.6.

By the Court,

Representation:

The Claimant was represented by Ms. Assiya Azimkali, Legal Counsel, Aurora AG Limited.

The Respondent was not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

3 August 2020

CASE No: AIFC-C/SCC/2020/0002

NURSULTAN ALIYEV

Claimant

v

PROPORTUNITY MANAGEMENT COMPANY LTD.

Defendant

JUDGMENT

Justice of the Court:

Justice Charles Banner QC

ORDER

1. The Claim is dismissed.

JUDGMENT

Introduction

1. By this claim, the Claimant, Mr. Nursultan Aliyev, seeks damages totalling KZT 199,089.50 and other relief against the Defendant, Proportunity Management Company Limited ("**Proportunity**"), arising out of what he says was an employment contract between him and Proportunity which was terminated without the notice period prescribed by law and without payment of a portion of accrued salary. The basis of the claim, and the damages and relief sought, are described in more detail below.

2. Proportunity is a registered participant in the Astana International Finance Centre (**"AIFC"**).

3. Contracts of employment with AIFC participants are governed by the AIFC Employment Regulations (AIFC Regulations No. 4 of 2017, as amended in July 2019) (**"the Employment Regulations"**). The claim is founded upon alleged breaches of the Employment Regulations.

4. Regulation 4 of the Employment Regulations provides:

> " (1) These Regulations apply to an Employee of AIFC Bodies, AIFC Bodies' Organisations, the AIFC Participants, and to the Employee's Employer.
> (2) These Regulations provide the applicable law for the Contract of Employment of the Employee.
> (3) Any dispute arising under these Regulations shall be subject to the jurisdiction of the Court."

5. The reference to "the Court" in Regulation 4(3) is to the AIFC Court: see Schedule 1 of the Employment Regulations.

6. The AIFC Court was established pursuant to the Constitutional Statute of the Republic of Kazakhstan on the Astana International Finance Centre (Constitutional Statute No. 438-V ZRK of 7 December 2015) (**"the Constitutional Statute"**). Pursuant to Regulation 13(5) of the Constitutional Statute, on 5 December 2017 the AIFC Management Council approved the AIFC Court Regulations.

7. By Regulation 26(1)(b) of the AIFC Court Regulations, the Court has exclusive jurisdiction over (amongst other things) "any disputes relating to operations carried out in the AIFC and regulated by the law of the AIFC". The law of the AIFC includes the Employment Regulations.

8. It is therefore plain that the AIFC Court has jurisdiction over the dispute in the present case.

9. Regulation 30 of the AIFC Court Regulations provides for rules to be made for the practice and procedure to be followed in the AIFC Court. Pursuant to this provision, the AIFC Court Rules ("**the Rules**") were made in January 2018. Part 28 of the Rules relates to the Small Claims Court (**"SCC"**), which by Regulation 9 of the AIFC Court Regulations is a division of the Court of First Instance ("**CFI**"). Rule 28.2 provides:

"The SCC will hear and determine claims within the jurisdiction of the Court:

(1) where the amount of the claim or the value of the subject matter of the claim does not exceed USD 150,000;
(2) where the amount of the claim or the value of the subject matter of the claim does not exceed USD 300,000 and all parties to the claim elect in writing that it be heard by the SCC;
(3) where the claim relates to the employment or former employment of a party and all parties elect in writing that it be heard by the SCC; and
(4) such other claims as may be ordered or directed by the Chief Justice to be heard by the SCC from time to time."

10. The amount of the claim in the present case is below USD 150,000. The case also relates to what is claimed to be the former employment of Mr. Aliyev, and both parties have elected in writing that it should be heard by the SCC. For either or both these reasons, the SCC is the division of the CFI required to determine the claim.

Procedural background

11. Mr. Aliyev, who is a litigant in person (albeit a qualified lawyer), filed his claim on 3 July 2020. Within Section 2 of the Claim Form, entitled "Brief Details of Claim", he set out details of what he said were the facts underpinning his claim, as well as the provisions of the Employment Regulations on which he relied. This was accompanied by a Statement of Truth, signed by Mr. Aliyev. The Brief Details of Claim referred to 12 documents, which were appended to the Claim Form.

12. Proportunity, which is represented by Ms. Gaussar Abduova, filed its defence on 10 July 2020, within the time limit prescribed by Rule 28.12 of the Rules. This was accompanied by a Statement of Truth by Mr. Arman Barmenbayev, Chief Executive Officer and Director of Proportunity.

13. Pursuant to Rules 28.15-28.23 of the Rules, after a Defendant in a SCC claim has filed and served a defence, the parties have an opportunity to request, within 7 days of the service of the Defence, a consultation conducted by the Registrar of the AIFC Court or a person appointed by the Registrar. The purpose of the consultation is "to allow the parties to attempt to resolve their dispute by agreement" (Rule 28.17). In the present case, the Defendant desired a consultation, but the Claimant did not. A consultation therefore did not take place.

14. Rules 28.24-28.25 provide:

" 28.24 If no consultation is fixed by the Court or if the claim is not settled at the consultation, the Court will give directions for the preparation of the small claim for trial.

28.25 The Court may:

(1) fix a date for the final hearing of the small claim;
(2) inform the parties of the time allowed for the final hearing;
(3) require the parties to give further information about their case; and
(4) order each party to file and serve on every other party statements of any witness or copies of any further documents on which they intend to rely at the hearing."

15. Pursuant to these rules, on 20 July 2020 I directed that an oral hearing should take place using video conferencing (an in-person hearing being impossible due to the COVID-19 related restrictions) on 29 July 2020, to last no more than 2.5 hours. Although Mr. Aliyev in Section 5 of his Claim Form had sought a determination on the papers without an oral hearing, and Rule 28.39 enables the SCC to

deal with a claim without a hearing, I decided that a hearing was appropriate in this case. This was because, as elaborated below, the dispute between the parties is centred upon their competing factual accounts of what was, or was not, offered orally to Mr. Aliyev by Proportunity or its Director Mr. Yerbolat Sarsenbayev. It was therefore appropriate to hold a hearing so that the factual evidence could be tested orally and evaluated by the Court in that light.

16. The directions dated 20 July 2020 also required the parties to file and serve "any further information, including any statements of any witnesses and any other documents, together with a list of any witnesses who are to give oral evidence at the hearing" no later than 18:00 Nur-Sultan time on 24 July 2020. Pursuant to this, Mr. Aliyev filed two documents (extracts from Proportunity's job advertisement and from a WhatsApp conversation) and Proportunity filed two written statements in the names of Mr. Sarsenbayev and Ms. Yelena Polichshuk.

17. On 28 July 2020 I gave directions for the timetable and conduct of the hearing. Given the central importance of the competing factual evidence to determining the dispute between the parties, I required pursuant to Rule 28.30 (having regard to the overriding objective in Part 1 of the Rules) that oral evidence should be taken on affirmation. For the same reason, I allowed each party a timelimited opportunity to cross-examine the witness(es) for the opposing party. I wish to stress that cross-examination of opposing witnesses is not an automatic right in SCC proceedings (see Rules 28.28 and 28.31) and my decision to allow it in the particular circumstances of this case should not be seen as setting a general precedent. Whether cross-examination is appropriate in the hearing of any particular SCC claim will turn on the application of the overriding objective in Part 1 of the Rules, together with the relevant provisions of Part 28, to the particular circumstances of the case.

18. The hearing took place as planned on 29 July 2020. At the outset, Ms. Abduova on behalf of Proportunity sought my permission to produce further documentation, amounting to multiple pages, which she described as correspondence which further supported Proportunity's characterisation of Mr. Aliyev's role. I ruled that this additional documentation should not be admitted. There was no convincing reason why this document had not been filed and served by the 24 July 2020 deadline prescribed in my directions dated 20 July 2020. Allowing this document belatedly to have been admitted would have necessitated an adjournment to allow Mr. Aliyev (a litigant in person, albeit legally qualified) to consider it before giving his evidence. The description of the document did not suggest that it added anything of great significance to the material already before the Court. For these reasons, I decided that admitting this document would be inconsistent with the overriding objective in Rule 1.6 of the Rules of dealing with cases justly (see in particular subparagraph (2), "ensuring that the parties are on an equal footing", subparagraph (3) "ensuring that the case is dealt with expeditiously and effectively", and subparagraph (4) "dealing with the case in ways which are proportionate"). I wish to stress in particular that, where a litigant in SCC proceedings seeks to submit documents after the Court's deadline for written evidence has expired, and admitting those documents would require an adjournment to give the other party a fair chance to consider them, that is likely to frustrate the main objective of the SCC which is to provide a fasttrack, streamlined means of determining small claims. The Court will therefore require a great deal of persuasion that, in such circumstances, permission to file evidence out of time should be granted. ***The dispute between the parties***

19. Mr. Aliyev is qualified as a lawyer in Kazakhstan with over 6 years' professional legal experience at various organisations in Almaty and Nur-Sultan.

20. On 29 March 2020, he applied by email for an advertised job vacancy as a lawyer at Proportunity. He attached his CV to the email. Shortly afterwards he was contacted on WhatsApp by Mr. Sarsenbayev, who as noted above is a Director of Proportunity. There followed an exchange between them on WhatsApp which culminated in Mr. Sarsenbayev holding a telephone interview with Mr. Aliyev on 30 March 2020.

21. What happened next is in dispute.

22. Mr. Aliyev says that after the interview, he was "invited to the position of lawyer at Proportunity" (at the hearing he confirmed this was by Mr. Sarsenbayev orally). He states in his Claim Form:

> "On April 01, 2020, Mr. Sarsenbayev asked me through the WhatsApp messenger to send him a passport to conclude an employment contract, which I immediately send (Document 8)".

23. Document 8 is an extract from the WhatsApp exchange between Mr. Aliyev and Mr. Sarsenbayev. Mr. Sarsenbayev did indeed ask for Mr. Aliyev's passport, but there is no reference in his messages to an employment contract. There is no documentary evidence before me of the offer. Mr. Aliyev says that, in this respect, Proportunity was in breach of Regulation 11 of the Employment Regulations, which provides in relevant part:

> " (1) An Employee may only be employed under a Contract of Employment that is written in English and signed by both the Employer and Employee.
> (2) Within 2 months after the start of the employment, the Employer must give the Employee a written copy of the Contract of Employment that has been signed by both the Employer and the Employee."

24. Proportunity's Defence accepts that the interview between Mr. Sarsenbayev and Mr. Aliyev took place. It says, however, that during the interview Mr. Sarsenbayev informed Mr. Aliyev that he was not suitable for the advertised position at Proportunity, but instead:

> "… made a proposal to [Mr. Aliyev] for a paid internship under his mentorship, without accepting him to work for Proportunity Management Company Ltd, to which he agreed."

25. Mr. Aliyev's pleaded case also refers to a proposal of an internship, albeit in materially different terms:

> "The first two working weeks (April 1 to April 14) were announced to me as an unpaid internship by Mr. Sarsenbayev, although this was not previously specified in the job description or in a conversation with Mr. Sarsenbayev. I had to agree to these conditions. Having successfully completed the internship imposed by Proportunity, my work as a lawyer in Proportunity was continued."

26. Mr. Aliyev's version of events, therefore, is that the internship offered was with Proportunity (who had converted their previous offer of immediate employment to an offer of an initial internship), and that at its conclusion after two weeks he was retained as an employee of the company.

27. Proportunity says that that its characterisation of the relationship, as an internship with Mr. Sarsenbayev personally throughout, is reflected by the fact that Mr. Aliyev's remuneration was paid

from Mr. Sarsenbayev's personal bank account, as opposed to from Proportunity's bank account. Mr. Aliyev accepts in his Claim Form that, in April, "the salary came from Mr. Sarsenbayev's personal account". At the hearing, he said he did not know from which account the subsequent payments came from. Mr. Sarsenbayev's evidence was that they came from his personal account. In the absence of any contradictory evidence or any challenge in cross-examination to this aspect of his evidence, I accept that this was the case and proceed on the basis that all payments came from Mr. Sarsenbayev's personal bank account.

28. Proportunity also stresses that "all negotiations" were between Mr. Aliyev and Mr. Sarsenbayev, with no participation at any stage by Mr. Barmenbayev, Proportunity's CEO. This too is factually uncontroversial: on Mr. Aliyev's Claim Form, his references to written and oral discussions about his role during the months of March, April and May 2020 mention Mr. Sarsenbayev but no other active protagonist on Proportunity's side. Proportunity submits that this further supports the conclusion that what was offered to and accepted by Mr. Aliyev was an internship with Mr. Sarsenbayev personally as opposed to a contract of employment with Proportunity.

29. As noted above, following my directions on 20 July 2020, Proportunity filed two written statements, each signed and dated 24 July 2020. One of these statements is from Mr. Sarsenbayev, who wrote:

> "After the failure of the interview with the company, I offered [Mr. Aliyev] an internship with me, to which he agreed. I confirm that I paid him from my personal funds because he was doing work to help me, not the company."

30. The other statement was from Ms. Polichshuk, Manager of the Commercial Real Estate Sales and Purchase Department at Proportunity. She wrote:

> "Nursultan Aliyev did come to the office, but did not carry out any activities in the interests of the Proportunity Management Company Ltd. He carried out exclusively the instructions of our employee Mr. Sarsenbayev Y.B.."

31. I heard oral evidence from both Mr. Sarsenbayev and Ms. Polichshuk, for the Defendant, as well as from Mr. Aliyev, the Claimant. Mr. Sarsenbayev and Ms. Polichshuk gave their evidence in Russian, with the use of a court interpreter. Mr. Aliyev gave his evidence in English.

The remedies sought by the Claimant

32. If Proportunity's factual account of what was offered and accepted (namely, an internship with Mr. Sarsenbayev personally) is correct, then there was no contract of employment between Mr. Aliyev and the company. Mr. Aliyev's claim against Proportunity would therefore fail. It would not be necessary for the Court to consider the question of what remedy or remedies to grant Mr. Aliyev.

33. If, however, Mr. Aliyev's factual account of what was offered and accepted (namely, employment with Proportunity) is correct, then it would become necessary to consider the heads of damages that Mr. Aliyev seeks from Proportunity. As to this, Mr. Aliyev says:

    1) He was dismissed without notice on 12 June 2020, by Mr. Sarsenbayev, on behalf of Proportunity. Regulation 60(2)(a) of the Employment Regulations requires not less than 7 calendar days' notice to be given to an employee if their period of continuous

employment is less than 3 months (as here on Mr. Aliyev's own case).[1] Mr. Aliyev therefore claims 5 working days' worth of pay that would have been due to him if he had been given the prescribed notice, which he calculates to be 49,772 KZT.

2) He was not paid his salary for the period from 1 to 12 June 2020, which amounted to 99,545 KZT.

3) He was also due compensation in lieu of leave accrued under Regulations 27 and 28 of the Employment Regulations but not taken in the sum of 47,772.5 KZT. However, when I pointed out to Mr. Aliyev at the hearing that under Regulation 27(2) that vacation leave accrues pro rata for an Employee "who has been employed for at least 90 days in a year", and that the period he contends he was employed by Proportunity was less than 90 days, he indicated that he no longer pursued this remedy.

4) Proportunity failed to comply with its duty under Regulation 63 of the Employment Regulations to "enrol the Employee in the Employee's Kazakhstan pensions scheme in accordance with the legislation of Kazakhstan". There was no attempt to quantify this head of the claimed damages either in the Claim Form or in any other of the material provided to the Court before the hearing.

34. Proportunity's Defence is silent on these four matters. When I asked Ms. Abduova at the hearing for clarification of Proportunity's position in this respect, she did not elaborate beyond restating the company's denial that Mr. Aliyev had a contract of employment with it.

35. Mr. Aliyev's claim form seeks the following further remedy from the Court:

> "(5) Take measures regarding Proportunity by the AIFC authorized bodies for non-compliance with the AIFC regulations, in particular the AIFC Employment Regulations."

36. The rationale for this was expressed to be that:

> "According to [Regulation] 66(1)(b) of the AIFC Employment Regulations, the Board has a power to make rules necessary or convenient to be prescribed for giving effect to AIFC Employment Regulations, and there are no limits on the fines and other penalties that may be imposed for a breach of these Regulations."

37. This aspect of the relief which Mr. Aliyev seeks from the Court is misconceived. Regulation 66(1) imposes a discretionary power on the Board of the AIFC Authority to make rules. It does not confer any powers on the AIFC Court where no relevant rules have been made. I therefore do not consider this aspect of the claim any further.

Findings

38. The absence of any written record of what was offered to and accepted by Mr. Aliyev means that I have to make inferences from the evidence presented to me.

[1] The reference in Regulation 60(2)(a) is to "7 days"; the definition of "Day" in Schedule 1 of the Employment Regulations is "a calendar day".

39. In my judgment, the evidence supports the conclusion that, on the balance of probabilities, the role that Mr. Aliyev was offered and accepted, and which he undertook, was an internship with Mr. Sarsenbayev personally and not a contract of employment with Proportunity.

40. The principal considerations which have led me to this view are as follows:

1) If Mr. Aliyev was offered a contract of employment with Proportunity, then (particularly as he is a lawyer) I would have expected him to have sought prompt written confirmation of that offer, which he did not do. When this was put to him at the hearing, his answer was unconvincing. He said that he did not seek written confirmation because of the COVID-19 related lockdown in force at the time in Kazakhstan. The lockdown would not, however, have prevented written confirmation being sought and provided by email or WhatsApp messenger, which were the principal means by which he communicated with Proportunity and Mr. Sarsenbayev around the time of his application and interview.
2) There is also no evidence (other than his bare assertion in oral evidence) that, after Mr. Aliyev had been in position for two months he asserted his right under Regulation 11(2) of the Employment Regulations[2] to a written copy of the claimed contact of employment. He was plainly aware of this right since he now relies upon it in this claim. On his own case, problems had already arisen in relation to his relationship with Proportunity by the time the two month period had expired (see e.g. the references in his Claim Form to the unilateral imposition of an initial two week internship period and a subsequent reduction in his remuneration). I would expect in those circumstances that a qualified lawyer, aware that he had a legal right to a written copy of his contract of employment which had not yet been provided to him, would have promptly requested his employer in writing to comply with that requirement. Mr. Aliyev did not offer any convincing explanation for not having done so.
3) As noted at paragraph 27 above, the payments to Mr. Aliyev came from Mr. Sarsenbayev's personal account and not Proportunity's corporate account. I consider that this is a particularly compelling indicator that his role was with Mr. Sarsenbayev personally and not with Proportunity.
4) It is common ground that all the negotiations in late March about the role that Mr. Aliyev was to take up were between him and Mr. Sarsenbayev (see paragraph 28 above). There was no meaningful involvement by anyone else at Proportunity. This is consistent with, and supports, Proportunity's case that the role which Mr. Aliyev took up was an internship with Mr. Sarsenbayev personally.
5) Mr. Sarsenbayev had a credible and persuasive answer to my question to him at the hearing as to why, if he had judged Mr. Aliyev to be inadequately experienced for the advertised vacancy at Proportunity, he nonetheless offered him an internship: in summary, the role at Proportunity required considerably more knowledge and experience (which he considered Mr. Aliyev did not have) given its more demanding nature, whereas the personal internship offered Mr. Aliyev a lower-level opportunity to improve his skillset. Mr. Aliyev's questioning of Mr. Sarsenbayev on this point focused on the fact that the two men were of a similar age and number of years' experience – his point being that it was inherently improbable that one would be offered, and accept, an internship with the other

[2] Regulation 11(2) provides: "Within 2 months after the start of the employment, the Employer must give the Employee a written copy of the Contract of Employment that has been signed by both the Employer and the Employee."

– but Mr. Sarsenbayev gave a powerful riposte noting that he had in his time as a lawyer gained experience of some 200 court cases whereas Mr. Aliyev only had experience of around 10 court cases. It was clear to me from his evidence that Mr. Sarsenbayev is a highly intelligent, articulate and successful individual who has so far achieved greater professional standing than Mr. Aliyev. I therefore do not find anything inherently incredible about Mr. Sarsenbayev offering Mr. Aliyev a personal internship with him, or with Mr. Aliyev accepting that offer.

6) In response to questions from Ms. Abduova and the Court at the hearing about the details of the work he claims he did for Proportunity, Mr. Aliyev's answers were vague and lacking in detail. By contrast, the oral evidence of Mr. Sarsenbayev was detailed and convincing in describing the non-Proportunity work that Mr. Sarsenbayev said Mr. Aliyev did for him personally. One example given was in relation to a dispute relating to tobacco importation for a company in Almaty which is one of Mr. Sarsenbayev's personal clients outside the sphere of his work at Proportunity. I asked Mr. Aliyev whether he accepted that he had done work for Mr. Sarsenbayev in relation to this non-Proportunity matter and, in my view tellingly, he said that he had.

7) Ms. Polichshuk's written evidence, which was not challenged, was that she had not encountered any work done by Mr. Aliyev for Proportunity. In oral evidence she convincingly explained that, as Manager of Proportunity's Sales Department, she would inevitably have encountered his work if he had been employed by Proportunity (rather than Mr. Sarsenbayev personally) given that her role was central to the transactional side of the company's real estate investment business.

8) As noted at paragraphs 22-23 above, in his claim form Mr. Aliyev described the WhatsApp message from Mr. Sarsenbayev to him on 1 April 2020 as asking for a copy of his passport "to conclude an employment contract", but in fact this is a material gloss on what the WhatsApp message actually said. Mr. Sarsenbayev asked for a copy of the passport but there is no refence to an employment contract. This unwarranted embellishment has led me to approach Mr. Aliyev's evidence with a degree of caution.

9) The documentary evidence submitted by Mr. Aliyev on 24 July 2020 pursuant to my first directions order included a WhatsApp exchange between him and Mr. Barmenbayev, who as I already mentioned, is Proportunity's CEO. There were two passages in this document (which was translated into English prior to the hearing) that, read in isolation, arguably gave the impression that Mr. Barmenbayev was giving professional instructions to Mr. Aliyev (and thus gave some support to Mr. Aliyev's case that he was employed by Proportunity as opposed to being Mr. Sarsenbayev's personal intern). I was, however, persuaded by Mr. Sarsenbayev's response when I put this to him at the hearing. The first passage concerned messages at 13:45 and 13:46 on 26 May 2020, in which Mr. Barmenbayev asked Mr. Aliyev to print certain documents. Mr. Sarsenbayev's response was that (a) there was nothing in the exchange indicating that this was legal work falling within the advertised job description of a lawyer at Proportunity which Mr. Aliyev had applied for and which he claims he was offered and accepted, and (b) it was not such work. I agree with part (a) of his answer and accept part (b). The second passage concerned a message at 13:03 on 28 May 2020 in which Mr. Barmenbayev requested to be provided with certain categories of contracts. Mr. Sarsenbayev said in oral evidence at the hearing that this was a request made by Mr. Barmenbayev (his friend and business partner) on his behalf and at his request. Albeit with some initial hesitation, I accept this explanation on the balance of probabilities, given in particular the context of the other factors described in subparagraphs (1)-(8) above.

Conclusion

41. I have found that there was no contract of employment between Mr. Aliyev and Proportunity. I accept Proportunity's contention that Mr. Aliyev was recruited as an intern by Mr. Sarsenbayev personally. Mr. Aliyev's claim against Proportunity under the Employment Regulations therefore fails.

42. As Ms. Abduova for Proportunity acknowledged in her closing submissions, there remains a potential question as to whether Mr. Aliyev's internship with Mr. Sarsenbayev was itself a contract of employment to which the Employment Regulations applies and whether, if so, Mr. Aliyev might have a claim against Mr. Sarsenbayev. The parties did not invite me to express a view on this and I do not do so. I asked Mr. Aliyev at the hearing whether, in the event that I accepted Proportunity's characterisation of his role as Mr. Sarsenbayev's intern, he would wish to apply for Mr. Sarsenbayev to be added as a defendant to these proceedings. He declined, saying that he was only interested in a claim against Proportunity. In any event, the dismissal of this claim against Proportunity would not preclude a separate claim being brought by Mr. Aliyev against Mr. Sarsenbayev, in relation to which no court fee would be chargeable. There would therefore be no need to keep the current proceedings alive even if Mr. Aliyev did wish to pursue a case against Mr. Sarsenbayev.

43. The claim is therefore dismissed.

By the Court,

Representation:

The Claimant was represented by himself.

The Defendant was represented by Ms. Gaussar Abduova, Counsel (instructed by Mr. Arman Barmenbayev, Director, Proportunity Management Company Ltd.).

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

11 May 2020

CASE No: AIFC-C/CFI/2020/0001

INTEREX & COMPANY LIMITED LIABILITY PARTNERSHIP

Claimant

and

PROM REGION KZ LIMITED LIABILITY PARTNERSHIP

Respondent

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Robin Jacob

Court

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 8th May 2020 the Claimant seeks an Order from this Court to enforce the interim measures set forth in paragraph 86.1 of the Arbitration Award dated 6th May 2020 made by Mr. Alexander Korobeinikov, the sole arbitrator appointed by a letter of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of Kazakhstan, in Case IAC Arbitration No 1/2020.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

   (a) That Prom Region KZ Limited Liability Partnership be restrained from disposing of its funds held in its bank accounts in second-tier banks in the amount of no more than KZT 3,967,000.

   (b) That Prom Region KZ Limited Liability Partnership be restrained from disposing of its movable and immovable property the value of which is no more than KZT 3,967,000.

   (c) That Prom Region KZ Limited Liability Partnership be restrained from disposing of assets located in the site of Industrial Park Mangistau Limited Liability Partnership which are listed in Annex 1 to the contract on the sale of movable property No. 07-10/19 PR dated 7th October 2019 between Interex & Company Limited Liability Partnership and Prom Region KZ Limited Liability Partnership.

3. The Respondent is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Mr. Daniyar Nayazgulov, Lawyer, Benefits & Partners LLP.

The Respondent was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

23 July 2020

CASE No: AIFC-C/CFI/2020/0004

JSC ASTANA INTERNATIONAL FINANCIAL CENTRE AUTHORITY

Claimant

and

ONYX HEAVY MACHINERY LTD.

Respondent

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Robin Jacob

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 22 July 2020 the Claimant seeks an Order from this Court to enforce the interim measures set forth in paragraph 44 of the Arbitration Award dated 15th July 2020 made by Mr. Sergei Vataev, the sole arbitrator appointed by a letter of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of Kazakhstan, in Case IAC Arbitration No 3/2020.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

> That Onyx Heavy Machinery Ltd. be restrained from disposing of any of its assets in the Republic of Kazakhstan including accounts in any banks which shall be frozen in the amount of no more than KZT 2 600 920.50.

3. The Respondent is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Ms. Aida Iskakova, AIFC Authority.

The Respondent was not represented.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

3 August 2020

CASE No: AIFC-C/CFI/2020/0005

JSC ASTANA INTERNATIONAL FINANCIAL CENTRE AUTHORITY

Claimant

and

ONYX HEAVY MACHINERY LTD.

Defendant

JUDGMENT AND ORDER

Justice of the Court:

Justice Sir Robin Jacob

JUDGMENT AND ORDER

1. Pursuant to a Claim Form made on 3 August 2020 the Claimant seeks an Order from this Court to enforce the measures set forth in paragraph 56 of the Arbitration Award dated 28 July 2020 made by Mr. Sergei Vataev, the sole arbitrator appointed by a letter of Ms. Barbara Dohmann QC, the Chairman of the International Arbitration Centre of Kazakhstan, in Case IAC Arbitration No 3/2020.

2. Having read the Award it appears to me that application is justified. Accordingly, I hereby order:

> That Onyx Heavy Machinery Ltd. pay the amount of KZT 2 600 920.50 to JSC Astana International Financial Centre Authority no later than 6pm Nur-Sultan time on Wednesday 12 August 2020 being 15 days from the date of the arbitration award.

3. The Defendant is given liberty to apply to have this Order set aside within 7 days of service upon it of this Order.

By the Court,

Representation:

The Claimant was represented by Ms. Aida Iskakova, AIFC Authority.

The Defendant was not represented.

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

6 August 2020

CASE No: AIFC-C/SCC/2020/0003

STAR ASIAN MINING COMPANY LLP

Claimant

v

AURORA AG LIMITED

Defendant

JUDGMENT

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

1. The Defendant shall by 4pm on 3 September 2020 deliver to the Claimant the final logistical report and final digital data required by Schedule 1, paragraph 4 of the contract between the parties dated 17 July 2018.

2. The Defendant shall deliver the report and data referred to in paragraph 1 of this Order by providing the Claimant with two copies of each in digital format recorded on compact discs.

3. The parties have permission to apply to vary the time for provision of the report and data referred to in paragraph 1. Any such application shall be made by 4pm on 13 August 2020.

JUDGMENT

1. This is a claim for specific performance of the terms of a contract entered into between the parties on 17 July 2018 (**"the Contract"**). By the Contract, the Claimant engaged the Defendant to perform geophysical survey works in East Kazakhstan and to report the results to the Claimant.

2. The Claimant's case is that, although the Defendant has produced daily reports as required by the Contract, it has not provided the final report and data. The Claimant seeks specific performance of the Defendant's obligation to supply the final report and data, together with a declaration that the Defendant has acted unlawfully in failing to provide them. The Defendant's position is that it has already complied with its obligations under the Contract; that the Claimant has not paid what is due; and that the Contract has expired.

3. The Contract provides that disputes shall be subject to the jurisdiction of the Astana International Financial Centre Court. The parties agree that the value of the claim is within the financial limits of the Small Claims Court. The parties have filed written submissions and have asked the Court to decide the claim on the papers without a hearing.

4. The Defendant's obligations under the Contract were set out in Schedule 1, paragraph 4. In translation, that provision reads as follows:

> "4. Deliverables
>
> Daily production reports should be provided by e-mail. The field data should be delivered via email as each survey line is completed. Regular products will include concise notes on daily productivity and related matters, instrument dump files, reformatted text files on all survey lines.
>
> The final logistical report will be completed and supplied in digital PDF format and will include the following information:
>
> - Description of the survey coverage, type and methodology
> - Names of all persons involved in the survey
> - Technical description of the instrumentation
> - Data reduction and processing procedures
> - Contractor background

- Production summary
- Description of the digital data
- Location maps and figures formatted to fit on a standard 8.5 by 11 page size

The final digital data will include:

- Raw time series data (if requested)
- Final cleaned Geosoft format DAT files containing resistivity and chargeability (Mx and decay)
- Final pseudosections of chargeability and resistivity for each line in Geosoft GRD format
- Full grid coordinates
- Transmitter current and number of cycles used in the stacking process
- All QC test results, noise level assessment, and any related comments
- 2D inversion models of chargeability and resistivity for each survey block

The final report and all digital data should be supplied in digital format written to CD (2 copies) and will be delivered within five weeks of demobilization of the field crew."

5. By clause 3 of the Contract, the Claimant was obliged to pay the Defendant the Contract price in 3 instalments:

   a. 40% payable within 15 days of entering into the contract;

   b. 40% payable on completion of all field work;

   c. 20% payable no more than 5 business days after the Defendant issued the final report.

6. The Defendant completed the field work in August 2018. It also provided the Claimant with 14 daily reports of the survey operations. However, the Claimant did not pay any of the sums due. By SCC Claim No. 1 of 2019, the Defendant claimed the sums then due. The Claimant did not respond to the claim. It has never offered any defence, justification or explanation for its failure to pay.

7. By a judgment dated 25 April 2019 (**"the 2019 Judgment"**), the Claimant was ordered to pay the Defendant KZT 44,885,081.15 or the US Dollar equivalent at the time of payment. This comprised the sum of KZT 42,747,658.24, together with a late payment charge of KZT 2,137,382.91.

8. The sum due under the 2019 Judgment has now been paid. Payment was not made voluntarily but was obtained by attaching bank accounts to the credit of the Claimant.

9. It is common ground that the sum awarded and now paid represented the first two instalments due under the Contract. However, the parties differ as to the precise proportion of the Contract sum which has been paid.

10. The 2019 Judgment debt having been paid, the Claimant now seeks specific performance of the Defendant's obligation to provide the final report and final data required by Schedule 1, paragraph 4. The Claimant accepts that, once those documents are provided, it will be obliged to pay the outstanding part of the Contract price.

11. The Defendant resists the claim. In its response to the claim, the Defendant states that it is "*interested in transferring the reporting documents to the Claimant*". However, it states that that is "*no longer possible under a valid agreement*". It is however willing to enter into a further agreement for the transfer of the report to the Claimant. Similarly, by its letter to the Claimant of 5 June 2020, the Defendant said that it was "*ready to transfer [to] you [the] final results of the operations through entry into the Supplementary Agreement and advance payment.*"

12. The Defendant advances three arguments in its defence.

13. First, the Defendant asserts that it has already fulfilled its obligations under the Contract. In support of this, it points out that it has completed the field work required under the Contract and has provided 14 daily reports. That is not in dispute. However, by Schedule 1, paragraph 4 of the Contract, the Defendant was required to supply the Claimant with the final logistical report and the final digital data from the field work within 5 weeks of demobilisation. The Defendant does not claim that it has provided those documents to the Claimant. To the contrary. It has indicated that it is "*interested in*" and "*ready to*" transfer those documents, but only in the event that a further agreement is reached between the parties. The Defendant therefore implicitly concedes that it has not yet provided those documents to the Claimant. I therefore reject the Defendant's first argument.

14. Second, the Defendant argues that the Claimant was and remains in default of its payment obligations under the Contract. The Defendant points out that the Claimant failed voluntarily to pay the first two Contract instalments, amounting to 80% of the Contract price. The Defendant further complains that the sum finally paid by the Claimant was less than the sum which was in fact due, as a result of the fluctuation of exchange rates.

15. The Defendant has not explained why the Claimant's breach of the Contract in failing to pay would give rise to a defence for the Defendant. I am aware that, in certain circumstances, Kazakhstan (non-AIFC) civil law permits a party to a contract to withhold performance of its obligations, for example where the other party is in fundamental breach of its obligations. However, no argument has been directed at that issue and I have not been shown any provisions of Kazakhstan law which might assist the Defendant in this regard.

16. In any event, for the reasons which follow, I reject the Defendant's case that the Claimant still has an outstanding debt under the Contract.

17. There is no doubt that the Claimant has now paid the sum due under the 2019 Judgment – that is not disputed. There is however a difference between the parties as to whether that sum amounts to more or less than 80% of the Contract price and therefore whether it satisfied the Claimant's present payment obligations.

18. In its Claim Form, the Claimant asserts that the amount it has paid is 86.8% of the Contract price. In correspondence, it had put the proportion variously at 80% (letter of 11 May 2020) and 85% (letter of 29 May 2020). The Defendant takes a different view. In a letter to the Claimant dated 5 June 2020, the Defendant accepted that the payment represented 80% of the contract price. However, in its response to this claim, it has provided a schedule which states that the Claimant has paid just 70% of the Contract price.

19. The Defendant's argument is that the Claimant's payment obligation under the Contract was to be calculated by reference to the exchange rate between the US dollar and the Kazakhstan Tenge as at the date of payment. As a result of fluctuations in the value of the Tenge against the Dollar, the judgment sum at the date of payment amounted to only 70% of the Contract price.

20. In my judgment, these arguments are not open to either party. In the earlier claim, the Defendant brought proceedings and obtained judgment for the sum then due. The parties now agree that the first two payment obligations had arisen, but the third had not. In the circumstances, the Defendant's claim was for the first 80% of the Contract price. That claim has been finally determined in the amount of the 2019 Judgment sum. That determination is final and binding between the parties and cannot be challenged in subsequent proceedings. Further, the Defendant's right to payment for the first two instalments was merged into the 2019 Judgment. As a consequence, neither party can now claim that the payment ordered and paid is more or less than the sum due in respect of the first two instalments.

21. Whether or not the applicable law excused the Defendant's performance of its obligations under the Contract while the Claimant was in default of its payment obligations, the outstanding instalments have now been paid by satisfaction of the 2019 Judgment debt. In the circumstances, I reject the Defendant's second argument in support of its defence.

22. The Defendant's third argument is that the Contract expired on 30 October 2018. This appears to be based on clause 11.1 of the Contract, which states, in translation:

> "The Contract comes into force from the date of its signing and is valid until October 30 2018, and in respect of mutual settlements and provision of a report on local content – until full execution."

23. Clause 1.2 of the Contract provides:

> "Duration of works:
> Start: from the date of signing of the contract.
> End: until October 30, 2018."

24. The date of 30 October 2018 therefore appears to be the date by which all works under the Contract were to be completed by the Defendant.

25. The effect of the Defendant's argument is that any obligation it had to provide the final data and report simply expired on 30 August 2018. According to the Defendant, then, the phrase "*is valid until*" indicates that, after the designated date, the Contract was terminated and the parties rights and obligations came to an end. In my view, that cannot be the meaning of the clause.

26. First, the Contract makes clear that at least some obligations could arise after 30 August 2018. For example, by clause 3.1.1, the Claimant was obliged to pay the final 20% instalment 5 business days after receipt of the Defendant's final report. The Defendant's work was to be completed by 30 October 2018. The Contract therefore envisaged that the Claimant's payment obligation could arise after 30 October 2018.

27. Second, clause 11.1 does not say and cannot mean that accrued contractual rights and obligations would be extinguished on 30 October 2018. The Claimant's unpaid debts survived the 30 October 2018 deadline. So too would the Claimant's accrued rights and the Defendant's accrued obligations.

28. Field work was completed on or before 15 August 2018 (see 2019 Judgment, paragraph 13). By 30 October 2018, the obligation on the Defendant to provide the final report and data had already arisen. In my view, clause 11.1 could not be intended to allow the Defendant to escape its obligations to complete the Contract works at will, simply by failing to provide them. That would render the Contract unenforceable against the Defendant.

29. As I have said above, no explanation has been provided as to how the Claimant's failure to pay could have the effect that the Defendant's obligations under the Contract were suspended. Similarly, no explanation has been provided as to how any such suspension could then cause the obligation to be extinguished as from 30 October 2018 as a result of the operation of clause 11.1. In my view, it did not and clause 11.1 was not intended to have that effect.

30. I note also that clause 9 of the Contract appears to provide a complete contractual code for the termination of the Contract. In those circumstances, it is doubtful that clause 11.1 was intended to discharge the contract on 30 October 2018.

31. Clause 9.1 provides that:

> "The Contract can be terminated by agreement of the parties or in accordance with clause 9.2 of the Contract."

32. Clause 9.2 permitted the Defendant to cancel the Contract where payment was delayed by more than two months. However, by clause 9.3, such cancellation required the service of a written notice. While it is clearly arguable that the Defendant would have been entitled to invoke those provisions and terminate, the Defendant does not claim that it did so. Instead, on 6 May 2020, the Defendant wrote to the Claimant asking it, amongst other things, to pay the final 20% instalment of the Contract price. Rather than seeking to terminate the Contract, the Defendant was therefore seeking to rely on and enforce its terms.

33. In light of the history, the Defendant may well be concerned that the Claimant has no intention of paying the further sum which will fall due on delivery of the report and data. It might also have been arguable that such concerns justified the Defendant in terminating the Contract under the general law. However, the Defendant has not asserted or evidenced any attempt to do so.

34. In the circumstances, my view is that the Defendant is now obliged under the Contract to provide the final report and data to the Claimant. I make no finding as to whether it was entitled to withhold performance prior to recovering payment from the Claimant. However, in my view, now that the 2019 Judgment has been paid, the Defendant is obliged to perform the balance of the Contract. That obligation was subject to any right the Defendant may have had to terminate under clause 9 of the Contract or under the general law. At that stage, the Defendant was faced with a choice. It was entitled either to terminate the Contract or to perform it and claim the final payment instalment. It has not terminated the Contract. Instead, it has claimed the instalment, albeit prematurely. In the circumstances, it is obliged to perform.

35. I note that the Claimant also relies on clause 1.6 of the Contract in support of the claim. This provides that:

> "Ownership of all documents, materials, information received / acquired as a result of performance of Works by the Contractor belongs to the Customer."

36. According to the Claimant, then, it is already entitled to such of the final data as already exists in the Defendant's possession. The Defendant has not responded to this point. In light of clause 1.6, it is difficult to see how the Defendant could resist the claim insofar as it relates to that part of the data.

37. The Defendant has not raised any other objection to an order for specific performance. It is not said, for example, that preparation of the report and data would be unduly burdensome as a result of the passage of time. Instead, the Defendant has indicated that it is willing and able to produce the documents. Nor has the Defendant argued, for example, that the Claimant has no legitimate interest in the Defendant performing the balance of the contract.

38. In its Claim Form, the Claimant has made clear that it intends to pay the outstanding instalment once the report is delivered. The Claim Form is supported by a statement of truth. Given the history, there may be grounds to doubt whether the Claimant in fact intends to pay. However, I am sure that the Claimant and its officers have been made aware of the consequences of making false statements to this Court. In those circumstances, I am prepared to accept and rely on that statement in deciding what Order to make.

39. In the circumstances, ordering the Defendant to provide the final data and report is the best way to do justice between the parties and enforce the bargain that they made. I will therefore make an Order requiring the Defendant to produce the final report and data.

40. Neither party has suggested a timeframe within which the report and data should be produced. The Contract required that the report and data be provided within 5 weeks of demobilisation. Given the passage of time since the field work was completed, I will make an Order requiring production of the report and data within 28 days of this Judgment. I will however give the parties permission to apply within 7 days to vary that time, should they contend for a different period.

41. I do not propose to make any declaration as to the lawfulness of the Defendant's actions. The terms of the declaration sought are vague and I do not believe that they would serve any useful purpose, given the Order for specific performance that I make.

42. The final 20% instalment will be due within 5 business days after delivery of the report and data. The Tenge value of that instalment will fall to be calculated by reference to the US Dollar exchange rate as at the date of payment. Subject to identifying the date of payment, the precise amount due should be capable of straightforward calculation.

43. I expect that the final instalment will be paid, without the need for the Defendant to resort to further proceedings before this Court for its enforcement. As I have said, in making the Order, I have relied on the Claimant's statement that it intends to pay the final instalment when it falls due.

44. I also note that, while legal costs are not generally recoverable in the Small Claims Court, costs may be awarded against a party who has behaved unreasonably. I would anticipate that, should the Defendant need to bring further proceedings to claim the final instalment, that claim will be

accompanied by a request that the Court make an order for costs. The Claimant will no doubt by now be aware of the speed with which this Court is willing and able to act to assist parties in the enforcement of their contracts. There will be no material benefit to the Claimant from withholding the final instalment and significant potential detriment in doing so.

By the Court,

Representation:

The Claimant was represented by Mr. Yessimzhan Yegemberdiyev, Counsel, Regatta Consult.

The Defendant was represented by Ms. Assiya Azimkali, Counsel, Aurora AG Ltd.

IN THE COURT OF FIRST INSTANCE

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

07 October 2020

CASE No: AIFC-C/CFI/2020/0006

NURSULTAN ALIYEV

Appellant

v

PROPORTUNITY MANAGEMENT COMPANY LTD.

Respondent

JUDGMENT

Justice of the Court:

Justice Lord Faulks QC

ORDER

1. The permission to appeal application is dismissed.

JUDGMENT

1. The sole issue before the judge was whether the Appellant had a contract of employment with Proportunity Management Company Ltd. or whether he had an internship with Mr. Sarsenbayev personally.

2. The judge came to a clear conclusion on the facts, on the basis of written and oral evidence. I have considered carefully the judgment, the submissions on behalf of both parties and supporting documentation.

3. I direct myself in accordance with Rule 29.6 of the AIFC Court Rules 2018 and I reach the conclusion that the Appellant does not have real prospects of success in an appeal and that there is no other compelling reason why the appeal should be heard.

By the Court,

IN THE COURT OF APPEAL

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

3 December 2020

CASE No: AIFC-C/CA/2020/0009

NURSULTAN ALIYEV

Appellant

v

PROPORTUNITY MANAGEMENT COMPANY LTD.

Respondent

JUDGMENT

Justice of the Court:

Justice Sir Stephen Richards

ORDER

1. The application for permission to appeal is dismissed.

JUDGMENT

Background

1. By an order and judgment handed down on 3 August 2020 in Case No. AIFC-C/SCC/2020/0002, the AIFC Small Claims Court (Justice Charles Banner QC) dismissed a claim by Nursultan Aliyev for damages and other relief relating to alleged breaches of a contract of employment between him and the defendant, Proportunity Management Company Ltd ("Proportunity"). The judge found that there was no contract of employment between Mr Aliyev and Proportunity.

2. An application by Mr Aliyev for permission to appeal from the decision of the Small Claims Court was dismissed by the AIFC Court of First Instance (Justice Lord Faulks QC) by a judgment handed down on 7 October 2020 in Case No. AIFC-C/CFI/2020/0006.

3. On 29 October 2020 Mr Aliyev filed a further application for permission to appeal, this time to the AIFC Court of Appeal on the basis that it is the "appeal Court" to which a further application may be made pursuant to Rule 29.9 of the AIFC Court Rules 2018. The present order and judgment relate to that application.

4. Written submissions in opposition to the application were filed by Proportunity within the time laid down by Rule 29.14.

5. Rule 29.16 provides for an application for permission to appeal to be determined on paper except as provided for by Rule 29.17. I am satisfied that the present application can and should be determined on paper.

Jurisdiction

6. For the reasons given below, the Court of Appeal has no jurisdiction to entertain the application for permission to appeal. The issue of jurisdiction needs to be addressed by the court although it has not been raised by either party.

7. Part 5 of the AIFC Court Regulations (as made by Resolution of the AIFC Management Council dated 5 December 2017) lays down the jurisdiction of the AIFC Court. Article 26(7) states:

> "*The Small Claims Court shall have a special fast track procedure for claims below a specified value and Small Claims Court jurisdiction shall be defined in the AIFC Court Rules. Appeals of decisions of the Small Claims Court may be brought to the Court of First Instance, subject to the permission of the Court as set out in the AIFC Court Rules. No appeal lies to the Court of Appeal from any judgment given of the Court of First Instance on an appeal from the Small Claims Court.*"

8. Thus, jurisdiction to entertain an appeal from a decision of the Small Claims Court is conferred on the Court of First Instance alone. The Court of Appeal does not have any such jurisdiction. Nor does the Court of Appeal have jurisdiction to entertain an appeal from a decision of the Court of First Instance

on an appeal from the Small Claims Court. Since no appeal lies to the Court of Appeal in respect of such decisions, there is no room for any application to the Court of Appeal for permission to appeal in respect of them.

9. Consistently with the above provisions, the AIFC Court Rules make provision for an appeal from decisions of the Small Claims Court to the Court of First Instance but no further. Part 29 of the Rules governs appeals. By Rule 29.1(2), the rules in Part 29 are stated to apply to appeals to the Court of First Instance from the Small Claims Court. Rule 29.49 states in terms that "No appeal lies from the decision of the Court of First Instance on an appeal from the Small Claims Court …."

10. The provision made by Part 29 includes provision for applications for permission to appeal. By Rule 29.5, any appeal (except against a contempt order) requires permission to appeal. By Rule 29.6, permission may be given where the "lower Court" or the "appeal Court" considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard. Rule 29.2 defines "lower Court" as "the Court, tribunal or other person or body from whose decision an appeal is brought"; and it defines "appeal Court" as "the Court to which an appeal is made". Where it is sought to appeal a decision of the Small Claims Court, that Court is plainly the "lower Court" and the Court of First Instance is equally plainly the "appeal Court". By Rule 29.8, an application for permission to appeal may be made (1) orally to the lower Court at any hearing at which the decision to be appealed was handed down, or (2) to the appeal Court in an appellant's notice. That is the context within which Rule 29.9 provides:

> "*Where the lower Court refuses permission to appeal, a further application for permission to appeal may be made to the appeal Court in an appellant's notice.*"

The effect of this is that where an application for permission to appeal is made at a hearing before the Small Claims Court but is refused by that Court, a further application for permission to appeal may be made to the Court of First Instance as the appeal Court. Rule 29.9 does *not* allow for a yet further application for permission to appeal to be made to the Court of Appeal. To read it as making such provision would be inconsistent with the wording and scheme of the AIFC Court Rules themselves and with the jurisdictional framework established by the AIFC Court Regulations, under which, as indicated above, the Court of Appeal has no appellate jurisdiction in relation to decisions on a small claim.

11. In this case an application for permission to appeal from the decision of the Small Claims Court was made to the Court of First Instance but was dismissed by the Court of First Instance. That is the end of the matter. Mr Aliyev's further application to the Court of Appeal for permission to appeal pursuant to Rule 29.9 is misconceived and must be dismissed.

Substance

12. My decision that the Court of Appeal has no jurisdiction to entertain the application for permission to appeal makes it unnecessary to deal with the substance of the application. It may be helpful, however, for me to indicate briefly that I agree with the decision of the Court of First Instance and that if jurisdiction had existed I would have refused permission to appeal for the reasons summarised below.

13. As stated in the judgment of the Court of First Instance refusing permission to appeal, the sole issue before the judge in the Small Claims Court was whether Mr Aliyev had a contract of employment with Proportunity or whether he had an internship with Mr Sarsenbayev personally, and on that issue

the judge "came to a clear conclusion on the facts, on the basis of written and oral evidence". The judge's conclusion was based on a cumulative list of relevant considerations.

14. In so far as Mr Aliyev takes issue with the judge's conclusion by reference to the evidence before the Small Claims Court and what happened at the hearing in that Court, there is in my view no substance to the points advanced.

15. The main basis of Mr Aliyev's applications for permission to appeal, first to the Court of First Instance and now to the Court of Appeal, is his reliance on material which was not in evidence before the Small Claims Court. As he states in the present application, "I decided to look for other evidences to appeal in this case" and "I've provided whole new proofs, giving me the chance to defend my stance on this whole case". He attaches particular significance to information reportedly given by Mr Sarsenbayev to the Astana Financial Services Authority ("the AFSA") in support of an application for AFSA authorisation by International Law Company Ltd, and to evidence relating to legal services provided to Altyn Tau Company LLP under a contract between that company and International Law Company Ltd "represented by the management company Proportunity". That material is said to be inconsistent with oral evidence given by Mr Sarsenbayev to the Small Claims Court that work done by Mr Aliyev was for Mr Sarsenbayev personally and not as an employee of Proportunity. There are various other matters relied on in addition as damaging the credibility of Mr Sarsenbayev and the case advanced by Proportunity in the Small Claims Court.

16. It appears that Mr Aliyev views an appeal as an opportunity to relitigate the case with the benefit of the additional evidence he has found. The normal position, however, is that an appeal will be limited to a review of the decision of the lower Court (Rule 29.44) and that unless it orders otherwise the appeal Court will not receive evidence which was not before the lower Court (Rule 29.46). The receipt of fresh evidence by the Court on an appeal will therefore be an exceptional course. The Court can be expected to be particularly slow to receive such evidence on an appeal from the Small Claims Court since, as Justice Charles Banner QC observed in refusing permission to Proportunity to file evidence out of time in Mr Aliyev's case, the main objective of that Court is to provide a fast-track, streamlined means of determining small claims. Further relevant factors in the present case would include the specific opportunity given to the parties in the Small Claims Court to file additional evidence within a set timetable before the hearing of the claim; consideration of the extent to which the fresh evidence could have been obtained with reasonable diligence in time for that hearing; the fact that there is no direct evidence from the AFSA (Mr Aliyev simply recounts what he has been told by an AFSA official and asks the Court to request from the AFSA "all materials and testimonies" regarding the authorisation of International Law Company Ltd); the issues raised in Proportunity's submissions as to the admissibility, relevance and reliability of aspects of the fresh evidence; and the fact that the fresh evidence goes only to part of the considerations on which the judge's conclusion in the Small Claims Court was based.

17. Taking an overall view of the matter and directing myself by reference to the criteria in Rule 29.6, I do not consider there to be a real prospect that the fresh evidence relied on by Mr Aliyev would be received by the Court on an appeal or that an appeal would have a real prospect of success. Nor is there some other compelling reason why an appeal should be heard. To the extent that the application for permission to appeal raises issues concerning the AFSA authorisation of International Law Company Ltd, such issues are properly left to the AFSA to examine if it considers it appropriate to do so.

Conclusion

18. Accordingly, the application for permission to appeal is dismissed on jurisdictional grounds but would have been dismissed in any event on substantive grounds if the Court had had jurisdiction to entertain it.

By the Court,

Representation:

The Appellant represented himself.

The Respondent was represented by Ms. Gaussar Abduova, Counsel (instructed by Mr. Arman Barmenbayev, Director, Proportunity Management Company Ltd.).

IN THE SMALL CLAIMS COURT

OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

19 November 2020

CASE No: AIFC-C/SCC/2020/0007

ZHANDOS MAMYTKULOV

Claimant

and

ASTANA INTERNATIONAL EXCHANGE LTD.

Defendant

ORDER

Justice of the Court:

Justice Tom Montagu-Smith QC

ORDER

By Consent:

1. The claim is discontinued.

By the AIFC Small Claims Court,